United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1152

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For the Second Circuit.

IN THE MATTER
OF
The Petition for Arbitration Between FAIR WIND MARITIME CORPORATION, as Owner of the S. S. ISABENA,

Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION,
Respondent-Appellant.

BRIEF FOR APPELLEE.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-8076—1974

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BRIEF FOR APPELLEE.

Statement of the Issues.

1. Has the appellant waived the defense of insufficiency of service of process by failing to raise it in the proceedings in the District Court?

2. There being no issue as to the making of the arbitration agreement or the appellant's failure to comply therewith, was the District Court required to compel the appellant to proceed to arbitration?

3. Is the appellee entitled to an award of damages and double costs because the appeal is frivolous?

Statement of the Case.

The petition to compel arbitration was brought by a shipowner (appellee) against a charterer (appellant), to arbitrate certain disputes under a charter party dated at New York, June 14, 1972 (13a-14a). A notification of the shipowner's appointment of an arbitrator and demand for arbitration was sent by certified mail to the charterer's agent in New York on June 7, 1973 (19a). Although in its main brief the charterer raises the question of whether or when the demand was ever received, the fact is that the demand prompted a telephone call from the charterer's New York attorneys to the shipowner's attorneys, in which charterer's attorneys declined liability and refused to appoint an arbitrator (4a, 17a-18a). Moreover, the charterer has made the blatantly erroneous statement that the shipowner filed the petition without waiting for an answer to its letter of June 7, 1973. Although it was not part of the record in the District Court, this first reference by charterer to the allegedly hasty and inequitable conduct of the shipowner, requires that the court's attention be directed to a letter dated June 13, 1973, from the charterer's agent to the shipowner's attorney, in which all liability for the loss of the Isabena was denied. A copy of the letter is annexed to this brief. Charterer's claim that the filing of the petition on June 19, 1973, was precipitous is ill-founded and misleading.

A notice of hearing on the petition was served upon the charterer's New York agent on June 22, 1973. Charterer states that the record is "barren" of any evidence that the petition was served as required, overlooking the admission of personal delivery which is endorsed on the back of the petition. Charterer also claims that it has been deprived of an opportunity to answer the petition, entirely misconstruing the application of 9 U.S.C.

§4, which requires only five days notice of the petition for an order compelling arbitration. Of course, the procedure in this respect is governed by the Arbitration Act, and not by the Federal Rules concerning summons and complaint in ordinary actions. F.R.Civ.P. Rule 81(a)(3). In fact, the hearing was noticed for July 9, 1973, giving charterer seventeen days notice. The shipowner granted an additional two-week adjournment at charterer's request. A review of the record shows that all of the defenses which the charterer claims it would have raised in answer to the petition were indeed raised in its opposition and its motion to "alter or amend" the District Court's first decision.

Never has the charterer disputed the making of the agreement to arbitrate. However, in its initial opposition, it took the position that the legal issues were so simple and manifestly in charterer's favor that no arbitration was required (9a-11a). When the District Court decided to compel the arbitration, the charterer moved to "amend or alter" the decision, completely reversing its position by maintaining that "the legal questions involved are of such a complicated nature that they should not be left to the decision of 'commercial men' but should be decided by a court of law in a duly constituted jury trial" (21a), overlooking the fact that jury trials are not available in admiralty actions generally.

It is respectfully submitted that every tactic employed by charterer has had as its sole purpose the delaying of arbitration. When the petition to compel arbitration was granted on August 30, 1973, without opinion because of the fundamental rules governing the matters at issue, and after the shipowner had presented an order for settlement, charterer filed a motion on September 25, 1973, to "alter or amend" the decision, requesting the court to exercise its "discretion" to nullify

the arbitration clause and to hold in abeyence the signing of the order compelling arbitration. It is noteworthy that this oddly denominated motion was essentially an application for a reargument and was filed long after the permissible ten-day period under rule 9(m) of the general rules of the District Court. When the District Court denied the motion to amend by an opinion dated November 27, 1973, charterer again moved for a stay of the signing of an order effectuating the decision, on the assertion that time was needed to decide whether to appeal, notwithstanding the basic principle that the time for charterer to file its notice of appeal would not begin to run until entry of the order effectuating the court's memorandum decision. The order was signed on December 17, 1973, and charterer thereafter waited nearly the entire permissible 30 days until January 15, 1974, before filing its notice of appeal. The record on appeal was filed on February 1, 1974, and the charterer's brief was served precisely 40 days later on March 13, 1974. It is respectfully submitted that the obvious delays and the spurious bases of charterer's motion and appeal make this an appropriate case wherein the shipowner is entitled to damages and double costs under 28 U.S.C. §1912 and Rule 38 of the Federal Rules of Appellate Procedure.

ARGUMENT.

POINT I.

Charterer has waived the defense of insufficiency of service of process.

Charterer's contention that it has not waived the defense of lack of proper service, which defense is raised for the first time on this appeal, seems to be predi-

cated on the argument that no responsive pleading was served or Rule 12 motion made in the District Court. However, the Federal Arbitration Act and the Federal Rules of Civil Procedure provide for no responsive pleading to a petition to compel arbitration other than the affidavits in opposition thereto. Having made a general appearance in the court below, indeed having made two attempts to defeat arbitration, without mention of the jurisdictional issue, charterer is now precluded from asserting that defense. *Greenwich Marine Inc. v. S.S. Alexandra*, 225 F. Supp. 671, 675 (S.D.N.Y. 1964), aff'd 339 F. 2d 901 (2d Cir. 1965).

In any event, personal jurisdiction has in fact been obtained by personal delivery of the petition and notice of hearing upon charterer's New York agent, who had executed the charter party on the charterer's behalf. As this court held in *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 364 (2d Cir. 1964), the charterer has consented to the jurisdiction of the District Court by agreeing to arbitrate in New York. Under such circumstances "the sole function of process in this case was * * * to notify the appellant that proceedings had commenced. This function was certainly performed." To the same effect is *Trade and Transport Inc. v. Directorate General of Commerce, Saigon*, 310 F. Supp. 413 (S.D.N.Y. 1969), wherein service of the petition and notice of hearing upon a charterer's New York agent was deemed sufficient.

POINT II.

There is no issue concerning the making of the arbitration agreement or the refusal to comply therewith. The District Court was required to grant the petition.

Charterer has admitted the making of the charter party containing the arbitration agreement (9a). In a telephone conversation between counsel, arbitration was refused (4a, 17a-18a). The opposition to the petition on grounds which purportedly go to the merits of the underlying dispute further evinces the intention not to comply with the arbitration agreement. Therefore, as found by District Judge Pierce, there is no issue as to the making of the agreement or the charterer's non-compliance therewith. Section 4 of the Federal Arbitration Act, 9 U.S.C. §4, provides in pertinent part:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (Italics supplied.)

Since the charterer raised no issue of fact concerning the making of the agreement and there could be no issue as to the refusal to comply therewith, there was no necessity for a hearing on any issues of fact. The court properly exercised its limited function in granting the petition. *Prima Paint Corp. v. Flood & Conklin,* 388 U. S. 395, 404 (1967).

As the basis of its appeal, the charterer asserts that the dispute to be arbitrated is a frivolous one, employing a rather novel method of legal reasoning in arguing

that its research was unable to reveal any case in which a charterer was found liable for the loss of a vessel, and further citing some cases discussing charter party rights and liabilities generally. It need hardly be said that the shipowner considers its claim meritorious. However, this court is not the proper forum to argue the merits, which the parties have agreed to submit to arbitration.

In *United Steelworkers of America v. American Manufacturing Company*, 363 U. S. 564 (1960), the District Court had denied a petition to compel arbitration, in effect granting summary judgment on the merits. The Court of Appeals affirmed on the grounds that the grievance sought to be arbitrated was frivolous. The United States Supreme Court reversed, holding:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." 363 U. S. at 567-8.

In Point II of its brief, at page 11, charterer makes the rather strange statement that the federal arbitra-

tion statute "is identical" with the New York arbitration statute, and cites *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917 (App. Div., 1st Dept. 1947), aff'd 297 N. Y. 519 (1947), and other New York cases to the effect that a court may decline to refer a frivolous claim to arbitration. Patently, the statutes are not identical. However, the shipowner may safely concede the similarity of the function of the state and Federal courts concerning allegedly frivolous disputes. The charterer obviously has not read the New York Statute, because:

> "* * * the so called Cutler-Hammer doctrine has been overruled by CPLR 7501 (formerly Civ. Prac. Act, §1448-a). Under this provision, the court may not consider 'whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.'" *Matter of Wilaka Construction Co.*, 17 N. Y. 2d 195, 204 (1966).

POINT III.

This appeal is frivolous and the shipowner is entitled to damages and double costs.

The meaning of the Federal Arbitration Act is plain and the purpose clear, as declared by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin*, *supra*, at 404:

> "* * * a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

Not only has the charterer frustrated the very purpose of the law and the arbitration contract, *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F. 2d 291 (2d Cir. 1965), it has done so in reliance upon arguments which are patently contrary to settled principles of law and upon inconsistent factual statements and legal theories.

In its initial opposition to the petition, charterer in effect requested a summary judgment on the merits because certain *pro forma* charter clauses allegedly were clear and simple in releasing charterer from liability. On its motion to alter the District Court's first decision, charterer reversed itself by asking the District Court to exercise a discretion to abrogate the arbitration agreement and retain this alleged uniquely complex case. Indeed, charterer demanded a jury trial, although jury trials are not available in admiralty. In urging the existence of a discretion in the District Court to nullify the contract of the parties, charterer cited a single nineteenth century English decision, notwithstanding the express admonition of this Court of Appeals that "we should not follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration statutes." *Kulukundis Shipping Co. S.A. v. Amtorg Trading Corp.*, 126 F. 2d 978, 985 (2d Cir. 1942). On this appeal, charterer again reverses itself to the position that the underlying dispute is so free from complexity as to be frivolous, relying only on its own inability to find cases involving loss of ships, and citing general discussions on charterer rights and liabilities.

Charterer states that there is no evidence in the record of when the shipowner's arbitration demand was ever received, charging the shipowner with haste in filing the petition. Yet, charterer must know very well that

the demand was received well before the petition was filed, since the demand prompted a telephone call by charterer's local attorneys and it was this telephone call which prompted the filing of the petition. Charterer states that the shipowner did not await an answer to its demand letter, in apparent ignorance of a letter written by its own agent to the shipowner's attorneys.

Charterer alleges that a "thorough" search of the record makes no revelation as to service of the petition and notice of hearing. Yet, an actual search would have revealed an admission of service by charterer's agent on the litigation back of the notice of hearing.

In the District Court, charterer engaged in the rather unorthodox innovation of a motion to "amend or alter" a decision, submitting new affidavits and theories not previously presented, in contravention of and beyond the permissible filing period stated in local rule 9(m).

On appeal, charterer raises issues of service of the petition and the notice of hearing which it had the opportunity to raise below, and in doing so evinces a misunderstanding of the procedure for the enforcement of arbitration clauses.

Charterer urges on the one hand that it is unable to discern the dispute to be arbitrated, and on the other hand defines the dispute succinctly as one over the liability for the loss of the vessel, urging that it is not liable therefor on the merits.

In support of its argument that the court may deny a petition to arbitrate an allegedly frivolous dispute, and in the absence of authority to that effect under federal law, charterer brashly and baselessly equates New

York and Federal Statutes and proceed to cite New York cases which are no longer the law (Point II), as would have been revealed by simply reading the statute which it relied upon.

In all, charterer's position has been inherently contradictory and legally unfounded throughout. The only result has been an unwarranted obstruction of the arbitration process on grounds that can only be described as frivolous. It is provided at Rule 38 of the Federal Rules of Appellate Procedure that the Court of Appeals may award an appellee its just damages and single or double costs if the court determines that an appeal is frivolous.

In *In the Matter of the Arbitration between South East Atlantic Shipping Ltd. and Garnac Grain Company,* 356 F. 2d 189 (2d Cir. 1966), this court awarded damages for a frivolous appeal from an order confirming an arbitration award, using language applicable to an arbitration agreement as well:

> "We agree that the issues raised by Garnac are frivolous; they have been frequently resolved against litigants challenging the propriety of arbitration awards. We look with disfavor on attempts to have courts, and particularly courts of appeals, re-examine arbitration awards. Because of our narrow statutory scope of review, this is the kind of appeal that is least likely to have merit, and it is therefore an appropriate instance for the invocation of our Rule 26b powers, at least where, as here, the inference of an intent to delay is plausible."

It should be pointed out that while Second Circuit Rule 26b expressly required an intent to delay before damages could be imposed, the same is not true of F.R.App.P., Rule 38, which only requires that the appeal be frivolous.

Section 1912 of Title 28 specifies that the appellee may be compensated for the actual delay, although there is no mention of an intent to delay. In the instant case, the existence of delay is manifest and the intent to delay is more than a plausible inference. Here, as in the case of *Oscar Gruss & Son v. Lumbermens Mutual Casualty Co.*, 422 F. 2d 1278, 1283 (2d Cir. 1970), "* * * the net impression we get from the record is one of calculated delay and a thrashing about by [charterer] for theories—even of dubious or no value—to evade its obligations under its [arbitration] contract."

In the absence of a final money judgment herein, it is respectfully suggested that the measure of the shipowner's just damages is a reasonable sum for attorneys' fees and double costs. Only by an award of attorneys' fees and costs will such dilatory tactics as encountered herein be discouraged in the future and the court's docket be freed of matters which the parties have agreed to arbitrate.

CONCLUSION.

The decision and order of the District Court should be affirmed and the shipowner should be awarded damages and double costs.

Respectfully submitted,

HEALY & BAILLIE,
Attorneys for Appellee.

NICHOLAS J. HEALY, JR.,
JACK A. GREENBAUM,
Of Counsel.

Letter, Dated June 13, 1973, Admiralty Agencies Ltd., to Healy & Baillie.

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June 13, 1973

Healy & Baillie
29 Broadway
New York, New York 10006

Attention: Mr. N. J. Healy, Jr.

Gentlemen:

Re: S/S "Isabena"
C/P of 6/14/72

We acknowledge receipt of your letter of June 7, 1973 in connection with the above captioned vessel.

In the nearly one year since the vessel sank, we were not previously aware of any claim between our principals and Owners, concerning the loss of the "Isabena" nor can we conceive of any liability which may attach to a Time Charterer in this matter.

Very truly yours,

ADMIRALTY AGENCIES LTD.,
As Agents.

A MARANGOS for
Captain G. J. Ross

GJR/am

COPY RECEIVED ..... M., 4/18/1924

CLIFFORD, BROWN, CANTER & HAYS
ATTORNEYS FOR